

1 MARC M. SELTZER (54534)  
2 mseltzer@susmangodfrey.com  
3 BRYAN CAFORIO (261265)  
4 SUSMAN GODFREY L.L.P.  
5 1901 Avenue of the Stars, Suite 950  
6 Los Angeles, California 90067-6029  
7 Telephone: (310) 789-3100  
8 Fax: (310) 789-3150

9  
10 Attorneys for Plaintiff National Credit Union  
11 Administration Board  
12 (See Signature Page for Names and Addresses  
13 of Additional Counsel for Plaintiffs)

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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

NATIONAL CREDIT UNION  
ADMINISTRATION BOARD,  
as Liquidating Agent of U.S. Central  
Federal Credit Union and of Western  
Corporate Federal Credit Union,

Plaintiff,

vs.

RBS SECURITIES, INC., f/k/a RBS  
GREENWICH CAPITAL  
MARKETS, INC.; GREENWICH  
CAPITAL ACCEPTANCE, INC.;  
AMERICAN HOME MORTGAGE  
ASSETS LLC; INDYMAC MBS,  
INC.; LARES ASSET  
SECURITIZATION, INC.;  
NOMURA ASSET ACCEPTANCE  
CORP.; NOMURA HOME EQUITY  
LOAN, INC.; and WACHOVIA  
MORTGAGE LOAN TRUST, LLC.,

Defendants.

Case No. CV-11-5887 GW(JEMx)

**MEMORANDUM OF LAW IN  
SUPPORT OF NCUA'S  
MOTION FOR A BAR ORDER**

Am. Compl. filed: Nov. 14, 2014  
Judge: Hon. George Wu  
Courtroom: 10

## **PRELIMINARY STATEMENT**

This Motion arises from the settlement of claims between NCUA and Morgan Stanley (the “Settling Parties”).<sup>1</sup> The Settling Parties have agreed that NCUA’s claims against Morgan Stanley in the *Morgan Stanley Kansas Action*<sup>2</sup> and the *Morgan Stanley New York Action*<sup>3</sup> should be dismissed, and will file stipulations of dismissal once a ruling is issued on this motion. Morgan Stanley was the only defendant in either of those actions. NCUA has, however, brought claims against three other defendants – RBS, American Home, and Credit Suisse<sup>4</sup> – with respect to two RMBS Certificates at issue in the *Morgan Stanley Kansas Action* (the “Overlapping Securities”).<sup>5</sup> A term of the

<sup>1</sup> “NCUA” refers to the National Credit Union Administration Board, as liquidating agent for four credit unions (the “Credit Unions”): U.S. Central Federal Credit Union (“U.S. Central”), Western Corporate Federal Credit Union (“WesCorp”), Southwest Corporate Federal Credit Union (“Southwest”), and Members United Corporate Federal Credit Union (“Members United”). “Morgan Stanley” refers collectively to Morgan Stanley & Co., Inc., Morgan Stanley ABS Capital I Inc., Morgan Stanley Capital I Inc., and Saxon Asset Securities Company.

<sup>2</sup> NCUA v. Morgan Stanley & Co., Inc., No. 13-2418 (D. Kan.) (“Morgan Stanley Kansas Action”).

<sup>3</sup> NCUA v. Morgan Stanley & Co., Inc., No. 13-6705 (S.D.N.Y.) (“Morgan Stanley New York Action”).

<sup>4</sup> “RBS” refers to RBS Securities, Inc.; “American Home” refers to American Home Mortgage Assets LLC; and “Credit Suisse” refers to Credit Suisse Securities (USA) LLC.

<sup>5</sup> The Overlapping Securities were purchased from AHMA 2007-3 (12A2) (CUSIP #026935AD8) by WesCorp and SAST 2006-3 (A4) (CUSIP # 80556AAD9) by U.S. Central. With respect to AHMA 2007-3, NCUA brought Section 11 claims against Morgan Stanley in the *Morgan Stanley Kansas Action*, and Section 11, Section 12(a)(2), and California Blue Sky Law claims against RBS and a Section 11 claim against American Home in *NCUA v. RBS Sec., Inc.*, No. 11-5887 (C.D. Cal.) (“*RBS California Action*”). With respect to SAST 2006-3, NCUA brought Section 11, Section 12(a)(2), and Kansas Blue Sky Law claims against Morgan Stanley in the *Morgan Stanley Kansas Action*, a Section 11 claim against RBS in *NCUA v. RBS Sec., Inc.*, No. 11-2340

1 settlement is that the Settling Parties agree to seek the entry of appropriate orders  
 2 barring claims by RBS, American Home, Credit Suisse, and other alleged tortfeasors  
 3 not named as defendants in the NCUA litigation (the “Non-Settling Defendants”)  
 4 against Morgan Stanley for contribution or indemnity in connection with the  
 5 Overlapping Securities.

6 Courts have recognized that orders barring contribution and indemnity are key  
 7 to enabling settlements involving fewer than all defendants and alleged tortfeasors in  
 8 complex litigation such as these coordinated cases. The Second, Ninth, and Tenth  
 9 Circuits have all recognized that such orders are desirable and permissible in  
 10 appropriate cases. Two of the judges presiding over NCUA’s coordinated cases –  
 11 Judge Cote and Judge Lungstrum – have entered similar orders in earlier cases.<sup>6</sup> This  
 12 Court has recently granted NCUA’s request for a similar bar order in connection with  
 13 NCUA’s and Barclays’s settlement in *NCUA v. Barclays Capital*, No. 13-6727  
 14 (S.D.N.Y.) and *NCUA v. Barclays Capital*, No. 12- 2631 (D. Kan.).<sup>7</sup> Judge Cote has  
 15 also granted a similar bar order in connection with the *Barclays* settlement, and Judge  
 16 Lungstrum has indicated his willingness to do so.<sup>8</sup> NCUA’s Contribution Bar Order  
 17 (“Proposed Order”), appended as Exhibit A, has been modeled on the bar orders the  
 18 Courts have entered in connection with NCUA’s settlement with Barclays.

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19 (D. Kan.) (“RBS Kansas Action”), and a Section 11 claim against Credit Suisse in  
 20 *NCUA v. Credit Suisse*, No. 12-2648 (D. Kan.) (“Credit Suisse Kansas Action”).

21 <sup>6</sup> E.g., *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 613107, at \*9-11 (S.D.N.Y. Mar.  
 22 15, 2005) (Cote, J.); *Aks v. Southgate Trust Co.*, 1992 WL 401708, at \*16-17 (D. Kan.  
 23 Dec. 24, 1992) (Lungstrum, J.).

24 <sup>7</sup> Ruling on Motion for Bar Order, *NCUA v. Goldman, Sachs & Co.*, No. 11-6521,  
 25 ECF No. 490 (C.D. Cal. Dec. 21, 2015); Contribution Bar Order, *NCUA v. Goldman  
 Sachs*, No. 11-6521, ECF No. 491 (C.D. Cal. Dec. 21, 2015).

26 <sup>8</sup> Contribution Bar Order, *NCUA v. Barclays Capital*, No. 13-6727, ECF No. 207  
 27 (S.D.N.Y. Dec. 8, 2015) (Cote, J.); Memorandum and Order at 6-7, *NCUA v. Barclays  
 28 Capital*, No. 12-2631, ECF No. 137 (D. Kan. Dec. 4, 2015) (Lungstrum, J.).

1       The Proposed Order, appended as Exhibit A, would in substance (1) bar any  
 2 claims against Morgan Stanley for contribution or indemnity, including any claims to  
 3 recover all or part of any judgment or settlement against a Non-Settling Defendant  
 4 that arise out of NCUA's claims with respect to the Overlapping Securities; (2) bar  
 5 Morgan Stanley from asserting claims against any Non-Settling Defendant for  
 6 contribution or indemnity for all or part of Morgan Stanley's settlement payment to  
 7 NCUA; and (3) provide a judgment credit for any Non-Settling Defendant with  
 8 respect to the Overlapping Securities. A Non-Settling Defendant's judgment credit  
 9 will be the *greater* of the amount for which Morgan Stanley actually settled (as to the  
 10 Overlapping Security) or Morgan Stanley's proportionate share of fault for NCUA's  
 11 losses as proven at trial. That provision treats any Non-Settling Defendant at least as  
 12 generously as otherwise applicable law governing any contribution or indemnity rights  
 13 the credit recipient might be able to assert against Morgan Stanley.

14      The Proposed Order protects the confidentiality of the specific amounts  
 15 associated with the settlement of NCUA's claims based on each of the RMBS at issue.  
 16 Consistent with Judge Cote's and Judge Lungstrum's rulings concerning the Barclays  
 17 bar order, the Proposed Order provides that NCUA will disclose the allocation  
 18 information regarding the Overlapping Securities to the relevant defendants at the time  
 19 a pretrial order is filed in the *RBS California Action*, *RBS Kansas Action*, or *Credit Suisse*  
 20 *Kansas Action*. See Order at 2-3, *NCUA v. Barclays Capital*, No. 13-6727, ECF No. 206  
 21 (S.D.N.Y. Dec. 4, 2015) (Cote, J.); Order at 5, *NCUA v. Barclays Capital*, No. 12-2631,  
 22 ECF No. 137 (D. Kan. Dec. 4, 2015) (Lungstrum, J.).

23      The Proposed Order will promote the prompt and efficient resolution of these  
 24 and other RMBS disputes, while protecting all legitimate interests of the Settling  
 25 Parties and of all Non-Settling Defendants. For all these reasons and those discussed  
 26 below, NCUA respectfully requests that the Court enter the Proposed Order  
 27 substantially in the form attached as Exhibit A.

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## ARGUMENT

## I. The Proposed Contribution Bar Order Serves the Public Interest in Resolving Complex Litigation and Protects the Rights of Non-Settling Parties

“[W]here a case is complex and expensive, and resolution of the case will benefit the public, the public has a strong interest in settlement.”” *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 202 (2d Cir. 2006) (quoting *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856-57 (2d Cir. 1998)), abrogated on other grounds by *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (noting the “overriding public interest in settling and quieting litigation,” especially in complex cases); see also *In re WorldCom, Inc. ERISA Litig.*, 339 F. Supp. 2d 561, 567 (S.D.N.Y. 2004) (Cote, J.) (observing that the “importance of settlement to . . . complex litigation . . . is indisputable”).

Because “an unlimited right to seek contribution would surely diminish the incentive to settle” complex cases involving multiple parties, settling parties often include in their settlement agreement a provision that requires the parties to seek an order “that bar[s] contribution and indemnification claims between the settling defendants and non-settling defendants.” *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 591189, at \*5 (S.D.N.Y. Mar. 14, 2005); *see also Denney v. Deutsche Bank AG*, 443 F.3d 253, 273 (2d Cir. 2006) (explaining that without bar orders, defendants are unlikely to consent to settlement because such a “settlement would not bring . . . much peace of mind”); *Franklin*, 884 F.2d at 1229 (“Anyone foolish enough to settle without barring contribution is courting disaster.”) (quoting *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987)); *Aks*, 1992 WL 401708, at \*12 (Lungstrum, J.) (“Contribution inhibits settlement, particularly in complex, multiple defendant actions such as this.”). Thus, courts in the Second, Ninth, and Tenth Circuits routinely enter bar orders when requested by settling parties in order to protect settling defendants from claims for contribution or indemnity by non-settling persons. *See, e.g., Gerber v.*

1      *MTC Elec. Techs. Co.*, 329 F.3d 297, 307 (2d Cir. 2003); *Franklin*, 884 F.2d at 1231-32;  
 2      *FDIC v. Geldermann, Inc.*, 975 F.2d 695, 698 (10th Cir. 1992); *In re WorldCom, Inc. Sec.  
 3      Litig.*, 2004 WL 2591402, at \*14-15 (S.D.N.Y. Nov. 12, 2004); *Aks*, 1992 WL 401708,  
 4      at \*16.<sup>9</sup>

5                The Proposed Order is consistent with bar orders approved by the Ninth  
 6      Circuit in *Franklin*, 884 F.2d at 1232, and the Second Circuit in *Gerber*, 329 F.3d at 303,  
 7      and with guidance provided by the Tenth Circuit in *TBG, Inc. v. Bendis*, 36 F.3d 916  
 8      (10th Cir. 1994). It also tracks the language of the bar orders previously approved by  
 9      this Court and by Judge Cote in the NCUA litigation,<sup>10</sup> and by Judge Cote in the  
 10     FHFA litigation.<sup>11</sup> And it is consistent with a similar order entered by Judge  
 11     Lungstrum in *Aks*, 1992 WL 401708, at \*16-17.

12               The Proposed Order is no broader than necessary to protect the legitimate  
 13     interests of the Settling Parties, and it fully protects the interests of the Non-Settling  
 14     Defendants. It is no broader than necessary because “the only claims that are  
 15     extinguished are claims where the injury is the non-settling defendants’ liability to the  
 16     plaintiffs.” *WorldCom*, 2005 WL 591189, at \*10 (emphasis omitted) (quoting *Gerber*,  
 17     329 F.3d at 307); *see also TBG*, 36 F.3d at 928 (recognizing that courts have “allowed  
 18     bar orders” that cover “claims in which the damages are ‘measured by’ the defendant’s

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20               <sup>9</sup> *See also, e.g., Eichenholz v. Brennan*, 52 F.3d 478, 482 n.8, 487 (3d Cir. 1995)  
 21     (approving bar order extinguishing claims for contribution and indemnification  
 22     however denominated); *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 n.2, 496 (11th  
 23     Cir. 1992) (approving bar order extinguishing all claims for contribution or indemnity  
 24     against the settling defendants).

25               <sup>10</sup> Contribution Bar Order, *NCUA v. Goldman Sachs*, No. 11-6521, ECF No. 491  
 26     (C.D. Cal. Dec. 21, 2015); Contribution Bar Order, *NCUA v. Barclays Capital*, No. 13-  
 27     6727, ECF No. 207 (S.D.N.Y. Dec. 8, 2015) (Barclays bar order).

28               <sup>11</sup> *See, e.g., Order of Voluntary Dismissal with Prejudice and Bar Order*, No. 11-  
 29     7010, ECF No. 931 (S.D.N.Y. June 30, 2014) (RBS bar order); *Order of Voluntary  
 30     Dismissal with Prejudice and Bar Order*, No. 11-7010, ECF No. 884 (S.D.N.Y. May 9,  
 31     2014) (Barclays bar order).

1 liability to the plaintiff"). The Proposed Order meets that requirement because it bars  
 2 only claims that

3 seek[] to recover from the Settling Defendants [*i.e.*, Morgan Stanley] any  
 4 part of any judgment entered against the Non-Settling Defendants  
 5 and/or any settlement reached with any of the Non-Settling Defendants,  
 6 in connection with any claims that are or could have been asserted  
 7 against the Non-Settling Defendants that arise out of or relate to the  
 Overlapping Securities . . . .

8 Ex. A, at 2. That language (identical to the language of Barclays bar orders previously  
 9 approved and entered by this Court and Judge Cote, *see supra* note 10), adequately  
 ensures that Non-Settling Defendants will be barred from asserting only claims that  
 10 are based on the Non-Settling Defendants' actual or potential liability to NCUA.<sup>12</sup>  
 Moreover, the Proposed Order is as narrowly drawn as possible; it relates only to the  
 11 Overlapping Securities. *See* Ex. A, at 2-3.

12 The Proposed Order fully protects the interests of the Non-Settling Defendants  
 13 because – like the judgment credit provision upheld in *Gerber* – it “award[s] a credit  
 14 that is at least the settling defendants’ proven share of liability.” 329 F.3d at 303  
 15 (explaining that such a provision is sufficient to “protect[]” the “rights” of “non-  
 16 settling defendants” without requiring a separate judicial “determination of the fairness  
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20           <sup>12</sup> The Proposed Order defines “Non-Settling Defendants” to include alleged joint  
 tortfeasors that NCUA has not yet named in these consolidated cases. *See* Ex. A, at 2.  
 21 That definition gives Morgan Stanley necessary protection against any contribution or  
 indemnity claims by any such unnamed potential tortfeasors, while providing any such  
 potential parties with the dual protections of a judgment credit and a bar against  
 22 Morgan Stanley suing them for any part of its settlement with NCUA. Courts have  
 23 approved bar orders like this one that extend to unnamed potential tortfeasors. *See*  
*supra* note 10 (NCUA bar orders); *supra* note 11 (FHFA bar orders); Order at 7,  
*24 NCUA v. Barclays Capital*, No. 12- 2631, ECF No. 137 (D. Kan. Dec. 4, 2015)  
 (approving of Barclays bar order applying to “any other unnamed potential  
 25 defendants/tortfeasors that have not already been sued by plaintiff in other actions”);  
*see also In re WorldCom, Inc. Sec. Litig.*, 2005 WL 2010153, at \*1 (S.D.N.Y. Aug. 23, 2005)  
 (Cote, J.).

1 of the settlement"); *see Pinnacle West*, 51 F.3d at 197 (explaining that such a  
 2 "proportionate judgment" approach ensures that non-settling defendants are "not  
 3 prejudiced" but instead "are left in the same position they would have been if the  
 4 other parties had not settled"); *Aks*, 1992 WL 401708, at \*13 (finding that a judgment  
 5 credit based on a "proportionate offset" strikes an appropriate "balance between the  
 6 objectives of contribution and settlement").

7 Specifically, the Proposed Order entitles the Non-Settling Defendants to "a  
 8 judgment credit in an amount that is the greater of a) the amount of [NCUA's]  
 9 settlement with Morgan Stanley & Co., Inc. and Saxon Asset Securities Co. in the  
 10 Settled Actions allocated to the Overlapping Securities . . . or b) for each such claim,  
 11 state or federal, on which contribution or indemnity is available, the proportionate  
 12 share of Morgan Stanley & Co., Inc.'s and Saxon Asset Securities Co.'s fault as proven  
 13 at trial." Ex. A, at 3. That is, the Non-Settling Defendants can elect either to accept a  
 14 credit for the full amount of Morgan Stanley's settlement attributable to the  
 15 Overlapping Securities, or prove that Morgan Stanley's proportionate share of liability  
 16 was greater than the amount for which it settled (and then receive a credit for that  
 17 greater share). It thus entitles the Non-Settling Defendants to at least as large an offset  
 18 as they could otherwise have received at trial, and potentially a larger one.<sup>13</sup> That  
 19 approach mirrors the judgment-credit provisions approved by the Second Circuit in  
 20 *Gerber* and provisions previously approved by this Court and Judge Cote in the NCUA  
 21 litigation, and is more generous to the Non-Settling Defendants than the approach  
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23       <sup>13</sup> Under Section 11, the Non-Settling Defendants would have contribution claims  
 24 against Morgan Stanley at most for the amount of damages attributable to Morgan  
 25 Stanley's proportionate fault with respect to the Overlapping Securities. *See, e.g., Smith*  
*v. Mulvaney*, 827 F.2d 558, 560-61 (9th Cir. 1987) (adopting proportionate fault rule for  
 26 contribution for 10b-5 actions after analysis of statutory language of § 11). The Non-  
 27 Settling Defendants also likely have no right of contribution against Morgan Stanley  
 28 under California Blue Sky Law because California generally prohibits non-settling  
 parties from seeking contribution from settling parties. *See* Cal. Civ. Proc. § 877.

approved by the Ninth Circuit in *Franklin* and Judge Lungstrum in *Aks*.<sup>14</sup> It is fair and reasonable.

## **II. The Court Should Issue the Proposed Contribution Bar Order In *RBS California***

NCUA respectfully requests that the Court issue the Proposed Order in the *RBS California Action* without requiring Morgan Stanley to intervene. NCUA is a party to the *RBS California Action* and has a clear and legitimate interest in seeking a contribution bar order in order to facilitate the settlement of its claims against Morgan Stanley. The Ninth Circuit’s *Pinnacle West* case approved the entry of an order barring contribution and indemnity claims against a non-party, relying on the non-party’s role as a “critical participant and contributor to the overall settlement” and on the district court’s employment of a “proportionate” judgment offset like the one here. 51 F.3d at 197. Further, this Court’s recent ruling in *Goldman Sachs* found that NCUA “by itself alone” had standing to seek a similar contribution bar order. *See Ruling at 9-11, NCUA v. Goldman Sachs*, No. 11-6521, ECF No. 490 (Dec. 21, 2015). The same approach is appropriate here.

### **III. The Settlement Amounts for Specific Certificates Should Be Kept Confidential**

Certain terms of the settlement agreement are confidential because they disclose the amounts of the settlement allocated to specific RMBS Certificates (the “Confidential Schedule”). The amounts involved in a settlement are of great concern to parties who are negotiating a compromise to pending litigation; extending confidentiality to such amounts should thus be encouraged by courts to facilitate and foster settlement. *See, e.g., Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir.

<sup>14</sup> Compare *Gerber*, 329 F.3d at 302-05 (greater of proportionate fault or amount of settlement) and *supra* note 10 (same), with *Franklin*, 884 F.2d at 1231-32 (proportionate fault) and *Aks*, 1992 WL 401708, at \*17 (same).

1      2004) (explaining that there is no established presumption of access with respect to  
2 information contained in confidential settlement agreements that are not filed with the  
3 court and that “honoring the parties’ express wish for confidentiality may facilitate  
4 settlement, which courts are bound to encourage”); *Phillips ex rel. Estates of Byrd v.*  
5 *General Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002) (recognizing that district  
6 courts “have the authority to grant protective orders for confidential settlement  
7 agreements”). Accordingly, district courts are empowered to prevent access to  
8 confidential information relating to settlements “when necessary to encourage the  
9 amicable resolution of disputes.” *City of Hartford v. Chase*, 942 F.2d 130, 135 (2d Cir.  
10 1991).

11        Here, the information on the Confidential Schedule is a key part of the  
12 settlement. If that information were disclosed, it could prejudice NCUA’s ability to  
13 litigate and negotiate claims against other defendants, or Morgan Stanley’s ability to  
14 litigate and negotiate claims brought by other plaintiffs. Any interest of defendants in  
15 other lawsuits involving NCUA’s RMBS litigation or of the public in obtaining access  
16 to the Confidential Schedule is significantly outweighed by the Settling Parties’ right to  
17 maintain the terms of the settlement in confidence. Accordingly, the Proposed Order  
18 contains an appropriate request that the allocations in the settlement be made subject  
19 to a protective order of the Courts. Ex. A, at 3-4.

20        However, NCUA recognizes that disclosure of information about the specific  
21 amount allocated to the Overlapping Security will become necessary to give effect to  
22 the judgment credit provisions of the Proposed Order should NCUA proceed to trial  
23 in the *RBS California Action*, *RBS Kansas Action*, or the *Credit Suisse Kansas Action*.  
24 Accordingly, the Proposed Order provides that “at the time a pretrial order is issued in  
25 any action in which NCUA asserts claims based on the Overlapping Securities, NCUA  
26 shall disclose the information in the Confidential Schedule pertaining to the  
27 Overlapping Securities to any Non-Settling Defendant against whom NCUA asserts  
28 such claims.” Ex. A, at 4. This provision is consistent with the bar order approved by

1 Judge Cote, *see* Contribution Bar Order at 4, *NCUA v. Barclays Capital*, No. 13-6727,  
2 ECF No. 207 (S.D.N.Y. Dec. 8, 2015) (Barclays bar order), and Judge Lungstrum  
3 indicated that he would accept such a similar provision, *see* Memorandum and Order at  
4 4-5, *NCUA v. Barclays Capital*, No. 12-2631, ECF No. 137 (D. Kan. Dec. 4, 2015).<sup>15</sup>

5 **CONCLUSION**

6 NCUA respectfully requests that the Court enter the Proposed Order.

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25       <sup>15</sup> In its recent ruling in the *Goldman Sachs* case, this Court declined to resolve the  
26 question whether the bar order should explicitly require disclosure at the time of the  
27 pretrial order, because Goldman Sachs had not raised the issue. *See* Ruling at 9 n.12,  
28 *NCUA v. Goldman Sachs*, ECF No. 490. The Court did not express any disapproval of  
such a requirement, and NCUA has included one in the present proposed order.

1 Dated: January 6, 2016

2 GEORGE A. ZELCS  
3 KOREIN TILLERY LLC  
4 205 North Michigan Avenue,  
Suite 1950  
5 Chicago, Illinois 60601  
6 Telephone: (312) 641-9750  
7 Fax: (312) 641-9751

8 STEPHEN M. TILLERY  
9 DOUGLAS R. SPRONG  
ROBERT L. KING  
DIANE E. MOORE  
KOREIN TILLERY LLC  
11 505 North Seventh Street  
12 Suite 3600  
13 St. Louis, Missouri 63101-1625  
Telephone: (314) 241-4844  
14 Fax: (314) 241-3525

MARC M. SELTZER  
BRYAN CAFORIO  
SUSMAN GODFREY L.L.P.

MARK C. HANSEN  
DAVID C. FREDERICK  
dfrederick@khhte.com  
WAN J. KIM  
JOSEPH S. HALL  
GREGORY G. RAPAWY  
KELLOGG, HUBER, HANSEN,  
TODD, EVANS & FIGEL, P.L.L.C.  
Sumner Square  
1615 M Street, N.W., Suite 400  
Washington, D.C. 20036  
Telephone: (202) 326-7900  
Fax: (202) 326-7999

15  
16 By: /s/ David C. Frederick  
17 David C. Frederick

18 *Attorneys for Plaintiff NCUA*  
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23  
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